IN THE

Supreme Court of the United States

October Term, 1946

No. 606

UNITED STATES OF AMERICA,
Petitioner,

against

SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH,
Respondents.

BRIEF FOR RESPONDENT SAMUEL BAYER

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RULE CITED

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I

None of the Established Reasons for Certiorari is Present

(1) All that has happened below is that the Circuit Court of Appeals for the Second Circuit has ruled "that the ends of justice require a new trial in this case."

As regards the defendants Bayer, the reversal was on the following grounds (156 Fed. 2d 964):

1. The language of the charge to the jury on the crucial issue was "so equivocal" "as to be difficult to understand, if not actually misleading to a jury of laymen" (p. 967).

> 2. After the summations, the Trial Court received certain additional evidence which, as the court then pointed out, was incomplete and unprobative in one particular respect, but the court did not permit the jury to receive additional matter which became immediately available and which supplied the very thing which the court had declared to be missing. This ruling was prejudicial error and a misuse of discretion (p. 968).

Obviously, these rulings have no importance outside of the present case, and can be of significance only in the new trial which has been ordered.

Thus, this is a typical case where the Circuit Court of Appeals exercised its power to determine whether, in its opinion, "the ends of justice require a new trial" (p. 967); and where, as a result, that Court's determination is really nothing more than an expression of its view that the objectives of a just and final result would be more certainly served by having the case tried again.

(2) That this *was* the fundamental basis of the decision of the Circuit Court as to the Bayers is asserted right in its opinion which declares (156 Fed. 2d, 964, 967):

> "We are all agreed, however, though for somewhat differing reasons, that the ends of justice require a new trial in this case."

This determination and reversal as to the Bayers naturally and inevitably required a reversal also as to their co-defendant Radovich. Again to quote the opinion of the Circuit Court (p. 968):

> "In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich."

(3) It is true that the Circuit Court thereafter went on to discuss "two claims of error" by Radovich peculiar to

the case against him. But the fact is that, irrespective of such discussion, a reversal as to the Bayers necessitated a reversal as to Radovich. Hence, as to Radovich there is also no finality. It is entirely speculative as to how far the special discussion by the Circuit Court concerning him may have pertinency at all in the light of further developments and proofs at the new trial, especially since such discussion avowedly turned on the special state and incompleteness of the evidence in the record and avowedly recognized that on a new trial different evidence and different facts might develop and the blanks might be filled in.

Indeed, the Circuit Court itself expressly said (p. 970):

> "The record leaves the present status of the military judgment in doubt. * * * Determination of whether or not jeopardy attached (to Radovich) may therefore be more appropriately made when the full facts are in evidence on a new trial."

Likewise, the petitioner's own brief now expressly concedes (p. 21):

> "However, inasmuch as the record left the status of the military judgment in doubt, and a new trial was being ordered for other reasons, the circuit court of appeals left open the question of double jeopardy for determination on the new trial."

Hence, of the seven "Specifications of Error" enumerated on pages 22 and 23 of the petitioner's brief, the first five are really academic. They deal with a discussion by the Circuit Court of Appeals which was not necessary to the result, and which the Circuit Court itself declared might have no pertinency at the new trial. The remaining two Specifications (Nos. 6 and 7) relate exclusively to the decision of the Circuit Court of Appeals that the interests of justice required a new trial as to the Bayers and that, since the charge was conspiracy, the reversal must be as to all three defendants.

In short, as to all the defendants, the Circuit Court has done no more than rule that a fair and just result would

be better assured by having a new trial. On such new trial, as the Circuit Court pointed out, the full facts could be more completely developed as to all points, the jury could have the benefit of a clearer charge, and the pertinent law could be declared and applied with greater certainty.

(4) In no case which we know has such a disposition by the Circuit Court of Appeals been made the subject of a writ of certiorari from this Court.

Rule 38 of the Rules of the Supreme Court provides (par. 5):

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

This Rule then embodies various illustrations, such as a decision by a state court of a federal question not theretofore determined by the Supreme Court or not in accord with applicable decisions of the Supreme Court; diversity as between circuit courts of appeal or between a circuit court of appeals and local decisions; "an important question of federal law which has not been, but should be, settled by this court", etc.

The present case approaches in no way the wording of the Rule and has no parallelism with any of the illustrations therein given. It is the ordinary case where a Circuit Court of Appeals has in a criminal case ordered a new trial in the interests of justice and in order that the evidence and the facts may be more fully developed and a clearer charge given the jury.

II

The Jury's Recommendation of the "Highest Degree of Clemency"

On October 23, 1945, the jury returned a verdict of guilty with a recommendation for the "highest degree of clemency for all three defendants" (3526).

On the next day, the Court sentenced the defendant Samuel Bayer to a term of imprisonment of two years and a fine of $10,000 (which was the limit); the defendant Elias Bayer to a term of imprisonment of eighteen months and a fine of $5,000; and the defendant Radovich to a term of one year and a day (3632-4). The jail sentence of two years for Samuel Bayer was in excess of the United States Attorney's recommendation of eighteen months; and the jail sentence of Elias Bayer to eighteen months was in excess of his recommendation of a year and a day (3533-5).

III

The Charge as to the Defense of Extortion

(1) The charge to the jury was open to the criticism which this Court made on March 25, 1946, in *M. Kraus & Bros., Inc.* v. *United States*, U. S. Sup. C't, Law. ed. Advance Opinions, Vol. 90, No. 11, pp. 653, 660:

> " 'A conviction ought not to rest upon an equivocal direction to the jury on a basic issue.' *Bollenbach* v. *United States*, 326 U. S. ——, —— *ante*, 318, 322." (326 U. S. 607.)

In *Bihn* v. *United States*, U. S. Sup. Ct., Law. ed. Advance Opinions, Vol. 90, No. 17, p. 1208, decided June 10, 1946, this Court said (pp. 1211-2):

> "Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the

> erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Bollenbach* v. *United States*, 327 U. S. ——, *ante*, 318, 66 S Ct 402."

If the right and duty to make rulings of this character are part of the appellate jurisdiction of this Court, then all the more are they part of the appellate jurisdiction of circuit courts of appeals.

(2) At the outset, we challenge as untrue the statement on page 3 of the petitioner's brief that the trial judge's charge "concerning the defense of extortion" was "concededly proper." On the contrary, both at the trial and since we have earnestly argued that it was erroneous, misleading and prejudicial.

(3) As regards the Bayers, the "basic issue" in the case was whether or not the payments had been extorted by Major Radovich by threats to violate his duty, or had been made pursuant to conspiracy to seduce Radovich from his duty.

The basis of the Bayers' defense was that Major Radovich demanded money as the price of not forcing the two untrained boys to go with him on a commando expedition behind the Japanese lines in Burma. The theory of the prosecution was that Major Radovich accepted money as an inducement to see that the boys were not sent overseas. The Bayers claimed that they paid in fear that he would violate his duty. The prosecution claimed that they paid in agreement with him to violate his duty.

Exception was taken to the failure of the Trial Court to charge adequately as to this basic distinction, and to

its refusal of a request designed to clarify the fact and the nature of the distinction (3436, 3400-1).

The Trial Court, in its charge, though it fully outlined the theory of the prosecution, neglected to outline the theory of the defense. The Court merely said (3400-1):

> "Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include Privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer."

This was a mere description—and both incomplete and inadequate—of the defendants' claim. It was not a charge as to the extent to which in law it would be a defense or as to the rules of law which should be applied to its component elements.

It will be observed that there was no statement by the Court that the jury could find that there had been no agreement on the part of the Bayers if the jury believed the contention of the defense, namely, that the Bayers were the unfortunate victims of a shrewd plan of extortion. The Judge should have instructed the jury that, if the jury found that the moneys were obtained by Radovich from the Bayers as the consequence of a scheme of extortion concocted by Radovich, in that event there would not be a voluntary agreement, which is the essence of a conspiracy under United States Code, Title 18, Section 88. It will also be noted that the Court made no mention that the Air Commando unit was a voluntary one and that a special type of man was needed for it.

(4) These errors were greatly accentuated by two further errors in the Court's instructions to the jury.

In the first of these errors, the Trial Court told the jury, in practical effect, that the defendants Bayer would be guilty even though the payments of money were involuntary on their part. Thus the Court said (3401):

> "If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily."

This instruction was grossly misleading.

Certainly, if the payments were made by the Bayers involuntarily and as a result of duress, threats and coercion, the jury should have been instructed that they could find that there was no agreement on the part of the Bayers, inasmuch as it was the result, not of a true meeting of the minds, but of extortion and duress. The Court, on the contrary, charged in effect that if the defendants Bayer paid money to Radovich, the fact that such payment was made "involuntarily" would constitute no defense if it were made as part of an "agreement". The Court did not call the jury's attention to the vital consideration, which was fundamental in the defense, that if the so-called "agreement" was wrung from the Bayers by threats and coercion, then it and any payments made pursuant to it were not voluntary and, in consequence, the defense would be established. It was serious error for the Court to fail to include and submit the issue of whether the "agreement" which preceded the payment of the money was made voluntarily or involuntarily.

In other words, to confine, as did the Court, the question of voluntary or involuntary action to the mere payment of the money, without also extending it to include the issue of the "agreement" alleged to antedate the payment of the money, was basic and prejudicial error.

The jury evidently sensed this fundamental distinction in the moral quality of the Bayers' acts but felt themselves prevented by the Court's charge from giving that distinction expression in the field of law. In no other way can their exceptional recommendation of the highest degree of clemency be accounted for (3526).

(5) In the second of these errors the Court in effect instructed the jury to find the defendants Bayer guilty, even though the jury should find that the payments made by them were the result of coercion and extortion. This was the charge of the Court (3403):

> "However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or [redacted] the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants."

The foregoing instruction was highly misleading and prejudicial. In effect, the jury was instructed to find the defendants Bayer guilty, even though the so-called "agreement" and their payments under it were the consequence of the extortion threats of Radovich and were made as the result thereof, and even though all they desired was that Radovich should perform his true duty as to the boys.

(6) As a result of these confusions, the Circuit Court of Appeals declared and held that the charge (156 Fed. (2d) 964, 967)

> "was so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen. Of course, reversal should be ordered if the charge, although technically correct, is so equivocal as to be probably misleading in actual fact."

This declaration shows the petitioner's brief to be in error in stating at page 16 that "it does not appear from the opinion whether reversal of the judgments would have been predicated on such ground alone."

IV

The Matter of the Telephone Company's Record

(1) The Circuit Court of Appeals was also clearly entitled to hold that the Trial Court seriously prejudiced the Bayers in refusing to receive in evidence the record of the Telephone Company, which showed that a telephone call had been made collect by Radovich from Arlington, Virginia, presumably the Pentagon, to the Bayers' office in New York City on November 24, 1943 (3508-19). Exception was duly taken (3519).

The background shows the gravity of this error and the serious damage which it occasioned to the defense.

(2) Miss Solomon, Samuel Bayer's secretary, testifying for the defense, stated that Radovich telephoned her one morning in November 1943 from Washington and that she made an appointment for Samuel Bayer and her to meet him at Cavanagh's Restaurant in New York City (2779-80). He there made threats that the two boys would have to go with him on his Commando mission, and, if lucky, they would come home alive (2784-7). He further stated in this conversation that he had broad authority and if Bayer paid him $3,000 he could have the boys transferred into some other unit (2785-7). This took place *on the same day* that Martin Bayer called his father on the telephone from an Army Field in Connecticut and told him that he and his cousin Melvin Usdan were being transferred to Goldsboro, North Carolina (2788). Samuel Bayer said the same thing in his statement (Exh. 8, fols. 3686-9).

Melvin Usdan testified that he and Martin Bayer phoned to their folks on November 24th, telling about their transfer to Goldsboro (2582-7). The date (November 24th) was thus definitely fixed as the date of the Cavanagh Restaurant meeting described by Miss Solomon; and the U. S. Attorney, in his summation, referred to Usdan's statement of the date of his telephoning as accurate (3213-14).

In his summation, the U. S. Attorney laid great stress upon his claim that Radovich was in Goldsboro on November 24th (3211-17), since Miss Goertz (an Army employee in the Pentagon Building) had testified (766-7) that Radovich phoned her from Goldsboro, North Carolina, on November 24th concerning the transfer of Martin Bayer and Usdan. He argued accordingly that Radovich could not have been in New York City on November 24th, and that Samuel Bayer's statement and the testimony of Miss Solomon about the attempted extortion by Radovich at Cavanagh's Restaurant on November 24th were in consequence false, since Radovich was in Goldsboro at that time. He characterized it as "just another of the falsehoods" (3216). This was at the very conclusion of the summation, and court then adjourned to the next day (3219-20).

(3) On the next morning and before the charge to the jury, Mr. Keenan (the Bayers' counsel) informed the Court in chambers (3347-52) that, in view of the statements in the U. S. Attorney's summation above referred to, he was checking with the Telephone Company and that the Government must have among the records of the Bayers, which it had subpoenaed, a bill for a collect call from Washington on November 24th. He also stated that he wished to show that Radovich was in New York, as testified to by Miss Solomon, on November 24th and 25th (3352-3).

The Government, shortly thereafter, produced from its files a *bill* of the Telephone Company to the Bayers, show-

ing a collect call to Bayers' office from Washington on November 24th (3373-4).

Proceedings were then resumed in open court in the presence of the jury (3385). The Court proceeded to tell the jury, at the outset of its charge, that a Telephone Company bill to the Bayers showed a collect call from Washington to the Bayers on November 24th, but that "the record *does not show from whom the call came*" (3386-7).

It can be seen that what the Court said concerning the bill of the Telephone Company not only failed to connect Radovich with the collect call on November 24th but actually implied the absence of such connection.

The jury retired at 11:45 A. M. and returned for further enlightenment at 3:45 P. M. (3461). At that time, Juror No. 6 asked to hear again the U. S. Attorney's summation concerning the messages and meetings on November 24th and 25th (3487-8; 3499). Very evidently the juror had in mind that part of the U. S. Attorney's summation in which it was argued that Radovich could not have been in New York on November 24th in view of Miss Goertz's testimony that he telephoned to her from Goldsboro, North Carolina, on that date. The Court declined the request.

Eight minutes later the jury were again in court, requesting references to pertinent parts of the testimony as to that period (3499).

The Court, in response to this request referred the jury to the testimony of Miss Goertz, Miss Solomon and Usdan in reference to the dates, but did not cause any of it to be read. The Court said that the jury must rely on their memories (3500).

The jury thereupon again retired at 4:27 P. M. (3506). After the jury retired, Mr. Cohen, the associate defense counsel for Bayers, stated to the Court that the defense had not known that the U. S. Attorney was to make such an argument about November 24th; that he had made it only at the end of his summation; and that since that

time the defense had secured the original record of the Telephone Company's office in the form of an official *slip*, showing that the call had been made *by Radovich* (3509). Mr. Cohen then asked leave to put this Telephone Company record in evidence and emphasized that this was "highly important in view of the statements made to the jury by your Honor" to the effect that the *bill* had not shown from whom the collect call from Washington had come (3509-10). He also emphasized the statement made by one of the jurors "for further information concerning those dates" (3509). He exhibited the slip of the Telephone Company in open court (3510). It showed an Arlington, Virginia, collect call to Bayers' office *by Radovich* ("Captain Ravich") on November 24, 1943 (3509-13). Obviously the call was from the Pentagon; and obviously Radovich could easily have flown therefrom for a meeting at Cavanagh's Restaurant that afternoon.

The Court refused, however, to admit the Telephone Company's slip in evidence or to call it to the attention of the jury. The Court said that it came too late (3517-18).

Exception was taken to the ruling of the Court (3519). A motion was also made either for a mistrial or a new trial, which was denied; and exception again taken (3519).

(4) These rulings were serious error and, in view of what had occurred in court and in the minds of the jury concerning the date November 24th, gravely prejudicial. The case was still within the Court's control and was still being considered by the jury.

If Radovich did call the Bayers from Washington on November 24th and demand an immediate meeting in New York, it could only have been for extortion.

He was then in a position to show the Bayers that these two untrained and inexperienced boys were on that very day travelling south from New England under orders to join his Commando Unit for immediate service in Burma.

For two months previously Radovich had had no communication with the Bayers (3686). The special order for the boys' transfer to the Commando Unit had just been issued *at the instance of Radovich himself*. To quote the Government's brief in the Circuit Court (p. 8):

> "On November 22, 1943, at the instance of Radovich a special order issued directing the transfer of the boys as clerks to the Air Commando Group at Goldsboro, North Carolina, requiring attendance thereat not later than November 25th."

Again, to quote the Government's brief in the Circuit Court (p. 3): This Air Commando Unit was then "scheduled for immediate over-seas duty in the China-Burma-India Theatre."

Thus, on November 24th Radovich had the trap baited and ready for springing. If, on that day, he was not in Goldsboro but at the Pentagon Building demanding to meet the Bayers in New York, his purpose was clearly to demand a promise of money for opening the jaws of the trap.

(5) Obviously, the verdict might well have been different, had the jury been allowed to have knowledge of this final crucial fact, disclosed by the Telephone Company's office record, that Radovich was not in Goldsboro on November 24th as testified by Miss Goertz, but was at the Capital telephoning the Bayers for an immediate appointment, as testified by Miss Solomon and as stated by Samuel Bayer.

This was the very fact which the Trial Court itself had told the jury several hours earlier was missing from the Telephone Company's bill to the Bayers.

Hence, the Circuit Court of Appeals had the power to hold that, because of these rulings by the Trial Court, "the ends of justice" would be best served by a new trial. To quote the Circuit Court's opinion (p. 968):

"How important the matter had become was unmistakably shown by the jury itself. After four hours of deliberation, it returned to ask further instructions, one juror stating that several of them desired to hear again this part of government counsel's summation. And when recalled by the court eight minutes later, another juror had asked for references to pertinent parts of the testimony. Obviously the jury—however erroneously or for whatever reason—was vitally concerned with the question. While ordinarily a trial judge has a large area of discretion as to the reopening of a case for additional evidence, we think that in view of the importance which this issue had assumed the jury should not have been left with a partial and a misleading picture of the facts."

V

Conclusion

The case now comes down to this. The Circuit Court of Appeals has granted a new trial for reasons which have no significance outside the present litigation. It has held:

(1) As to the case against the Bayers, "the ends of justice require a new trial" (p. 967).

(2) "In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich" (p. 968).

(3) As to Radovich also, "determination of whether or not jeopardy attached may therefore be more appropriately made when the full facts are in evidence on a new trial".

The propriety of this disposition of the matter is clinched by the inescapable significance of the jury's recommendation of the "highest degree of clemency for all three defendants" (3526).

The Petition should be Denied.

Dated, New York, November 18, 1946

Respectfully submitted,

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